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FEDERAL COMMUNICATIONS COMMISSION
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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

REPLY TO "COMMENTS OF UNITED BROADCASTERS COMPANY"

Irene Rodriquez Diaz de McComas ("McComas"), by her attorneys, replies to the Comments of United Broadcasters Company ("Comments") in this proceeding, initiated by the Commission through a Notice Of Proposed Rulemaking, FCC 97-397 ("NPRM").

I.

PRELIMINARY STATEMENT

1. United Broadcasters Company ("United") which is one of four mutually exclusive applicants for a Class A channel in Rio Grande, Puerto Rico (within the San Juan urbanized area), has served its Comments upon its competitors, implicitly acknowledging that the Comments are designed to advance United's competitive position in the Rio Grande

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proceeding. United's candor is all to the good, but United's contentions are self-serving, sterile and, ultimately, of no use to the Commission in this broad-gauged rule-making proceeding. Specifically, the Comments largely duplicate United's contentions before the Commission en banc, in the Rio Grande comparative proceeding, while the instant rulemaking deals with across-the-board policy questions, including expedited dispatch of the Commission's business. Put otherwise, the Comments are not properly before the Commission in this rulemaking proceeding.

2. This is pointed up by the Comments' failure to address, in whole or in part, specific questions upon which the NPRM invites comment. Thus, United fails to address, as requested by paragraph 13 of the NPRM, whether the Commission has authority to dispose of mutually exclusive applications other than through auctions. United also essentially fails to heed paragraph 21 of the NPRM:

> "... Those commentators advocating continued use of comparative hearings for mutually exclusive applications pending before July 1, 1997 should explain how their proposed [comparative] criteria would be implemented in an administratively workable and judicially sustainable manner and demonstrate how the proposed criteria would predict good or better service or serve some independent public interest goal." (Emphasis added.)

3. Resolution of these two issues is necessary to determine whether pre-July 1, 1997 application conflicts may be decided other than by auction, and, whether, in any event, they should be resolved by auction, as the NPRM proposes, or by comparative hearings, with their multi-faceted warts. United's silence on these matters strongly supports the conclusion that (A) the Commission lacks authority to revert to comparative hearing proceedings, and (B) any such reversion would do violence to the public interest. These

conclusions derive overwhelming support from review of apposite history, law and policy set out in Part II hereof.

II.

ARGUMENT

A.

The Commission Is Required To Resolve
Broadcast Mutual Exclusivity In All Cases By Auction

4. United asks for comparative hearing disposition of the Rio Grande proceeding, without, as noted, addressing the issue of empowerment - which is an open issue in the Commission's opinion (NPRM, par. 13). In contrast, McComas' estimation is that the Balanced Budget Act of 1997 categorically forecloses and forbids hearings, and supersedes such proceedings with auctions. Any doubts on this score are rooted in semantics, but semantics must yield to the sense of the Conference Report:

> "New Section 309(b) requires the Commission to use competitive bidding to resolve any mutually exclusive applications for radio broadcast licenses that were filed with the Commission prior to July 1, 1997. ("Emphasis added.) (U.S. Code - Congressional and Administrative News (No. 7) September 1997, p. 194.)

The Conference Report's language is express, explicit and unbending, and should be respected, relegating comparative hearings to the history books.

B.

As A Matter Of Sound Policy The Commission Should
Resolve Cases Of Broadcast Mutual Exclusivity By Auction

5. Assuming, as a theoretical matter, that the Commission has latitude to decide that pre-July 1, 1997 mutually exclusive applications are grist for comparative hearings, the Commission nonetheless should exercise its administrative discretion to supplant

hearings with auctions - for the reasons set out in paragraphs 14 - 19 of the NPRM and also because orderliness, timeliness, finality, fairness and equity thereby will be served. These goals cannot be achieved, through the hearing process, in the absence of standards, and unfortunately the Commission has been unable to formulate legally sustainable comparative standards, for over five years, following invalidation of the Commission's integration policy - and no end is in sight, among other reasons, because the NPRM cites the obsolete factor of "diversification" as likely to have comparative relevance, overlooking the 1996 amendments to the Communications Act, and the Commission's day-to-day indifference to diversification in allowing gross concentrations of control to develop. (In the "relevant market" of San Juan, eight stations legally can be under common control and the Commission routinely endorses such concentrations without conducting meaningful, if any, anti-trust analyses.) Thus, Commission reliance on "diversification" would be no less "arbitrary" than the Commission's prior reliance on integration and would result in prolonged litigation in case-after-case, including specifically the Rio Grande proceeding. Such litigation would extend to other possible elements of preference, such as female preference or minority preference, and would waste Commission resources, delay new service to the public, and exhaust litigants. Notably, the Rio Grande proceeding has a vintage of "almost ten years," and in United's words:

> "The amount of time and effort expended ... has been enormous." (Comments, par. 9)

C.

Fairness and Equity

6. The NPRM recognizes the need for fair play in this matter and United seeks to capitalize thereon, arguing that all four applicants have equities flowing from their

hearing costs and their imputed expectations of ten years ago (1988), when the Rio Grande applications were filed in response to a cut-off list (Comments, par. 15). However, United's claims are facially defective - only Rio Grande Broadcasting Company has joined with United in requesting the Commission to revert to hearings. Moreover, as the NPRM (par. 14) notes, "... applicants have no vested right to a comparative hearing ..." and the Comments present no evidence, i.e., corporate minutes, company records, contemporary correspondence, that United filed its application, because it believed - in 1988 - that its application would be resolved exclusively on the basis of the "standard comparative issue". Indeed, United's "expectations" constitute no more than "post-hoc rationalization," given that United could not forecast its competitors and their comparative attributes at the time of filing, so United had no 1988 reason to favor hearings for disposition of its Rio Grande application. Moreover, there are multiple other good reasons for rejecting United's "expectations" claim as hollow, namely:

> A. For at least 30 years prior to 1998, auctions had been mentioned in the trade press as an alternative to hearings - Broadcasting, February 24, 1958, p. 200, referred to "... A proposal that 'television franchises' be awarded to the highest bidder ... "
>
> B. Prior to 1998, lotteries also were broadly known as potential alternatives to hearings.

The upshot is that United's ostensible "Great Expectations" are unsupported - and insupportable - and do not constitute a basis for reversion to hearings.

III.

CONCLUSION

7. Auctions statutorily are required for resolution of all conflicting broadcast applications but, assuming the Commission has discretion, in the premises, to do

otherwise, auctions should be adopted in order to facilitate the prompt dispatch of Commission business, to economize Commission resources and to bring new service to the public.

Respectfully submitted,

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Dated: February 17, 1998

CERTIFICATE OF SERVICE

I, ANNA McNAMARA, a secretary in the law offices of Robinson Silverman Pearce Aronsohn & Berman LLP, do hereby certify that on this 17th day of February, 1998, I have caused to be mailed a copy of the foregoing REPLY COMMENTS to the following:

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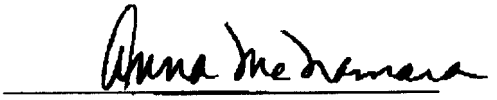

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